

# Istibdal Waqf Mosque Construction in Perspective of Fiqh Mu'amalah and Indonesian Positive Law

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**Abstract.** Mosques are always undergoing repairs (renovations) and even rebuilding. Then the lack of understanding of mosque managers often leads to the non-optimal use of waqf goods. Then what should be the understanding and actions that must be taken on waqf objects if it is deemed necessary for changes, exchanges, and sales of waqf objects (Istibdal)?, This research is qualitative research combined with library research (library research) with a legal approach (juridical normative) in Islamic law and positive Indonesian law specifically regarding waqf. The results of the study show that Istibdal Waqf is allowed according to the rules of Fiqh Mu'amalah (Islamic Law) with conditions; Dharurah, mashlahah and also more appropriate use and restore the original intention of using waqf (waqf pledge), Meanwhile, in a positive legal framework, this is also allowed on condition that there is clear information regarding the replacement and transfer which is then approved by the Ministry of Religion and the Indonesian Waqf Board (BWI).

**Keywords:** Istibdal waqf; Fiqh Mu'amalah; Positive law on waqf (waqf law)

## 1 Introduction

A mosque is a place used by Muslims to worship. As a place of worship, mosques often undergo repairs (renovations) and even rebuilding. Many things are the basis for the repair and rebuilding of the mosque, Among them is the area of the mosque that cannot accommodate the congregation of the mosque, changes to inadequate supporting facilities, and also following the current technological changes needed to support the smooth running of worship activities in the mosque.

The mosque as a means of worship on the way there was built with private funds and also community zakat funds (waqf). Over time, it turned out that the existence of the mosque in terms of facilities and infrastructure was felt by the management and congregation of the mosque to be inadequate, so there was a re-construction, renovation, and replacement of mosque facilities and infrastructure. Of course, this creates a new problem. 1) How is the law to tear down the old

mosque and replace it with a new one, 2) How does the law damage existing waqf goods, and 3). What if the waqf property is transferred to another place, 4) What if the waqf goods are sold, then bought back to goods that are more appropriate and useful.

In fact, changes in waqf objects in Islamic law are better known as *istibdal waqf*. However, linguists do not distinguish between the use of the word *ibdal* and *istibdal* because they both mean one, that is to make something a place for others. In addition, *istibdal* can also be interpreted as one type of property management, where the origin is allowed to be managed as long as it does not violate Islamic law. This concept of *istibdal* is not only known in the context of waqf but is found in certain legal issues that are different in each section. Some allow it, and some forbid it, including *istibdal zakat*, animal for sacrifice (*qurban*), *kafarat*, buying and selling, leasing, waqf, *hajj*, and others. (Al-'Ubaidiy, 2009).

Related to this waqf *istibdal*, it is necessary to study how to replace (*istibdal*) waqf items in the mosque. Is it following the rules of *fiqh mu'amalah* (Islamic law) and also positive Indonesian law regarding waqf?. This discussion aims to provide an understanding to the public about how to manage waqf and also how to replace (*istibdal*) waqf assets if needed.

## 2 Research Methods

Starting from the research problem under study, this type of research is descriptive qualitative research combined with library research, namely revealing facts, circumstances, phenomena, variables, and circumstances that occurred during the research and stating what they are (Sodik, 2015). The approach used is a normative legal approach (legal research) in terms of Islamic law and through positive law in Indonesia regarding waqf, By collecting from the sources of Islamic Law (*Fiqh Mu'amalah*) as well as positive law in Indonesia that is relevant to the problems of the research conducted.

### Legal Basis Of Waqf Istibdal In The Perspective Of Fiqh Mu'amalah

*Istibdal* is defined as a form of buying and selling *mawquf* (tough) either in the form of movable or immovable objects in the form of purchasing an asset to be exchanged for waqf assets with other assets (Az Zuhaili, 1997). *Istibdal* is one way to preserve waqf assets in a meaningful way, not in form, even though the assets have been replaced (Qudamah, 1969). Therefore, *Istibdal waqf* can be interpreted as a replacement, change, exchange, and sale of waqf goods carried out by waqf managers (*nazhir*) for waqf goods that already exist for other goods.

The following are sources that describe *istibdal waqf*, and from the following sources an opinion is generated that allows the practice of replacing waqf, namely (Syubair, 2009):

- a) Quran Surah Al-Hajj Verse 77; *"Do good deeds so that you are among the survivors"*. The practice of waqf replacement aims to take advantage of waqf assets and prevent harm that occurs without waqf replacement. So this practice can not be separated from the good deeds commanded by Allah SWT.
- b) Hadith of Rasulullah SAW; *"From 'Aisha Umm Al Mu'minin said: The Messenger of Allah said: If your people had not existed in the time of ignorance, the Ka'bah would have collapsed and stuck to the earth, and formed two doors; the door where people enter and the*

*door where they out*". The Ka'bah is a place that originates from waqf since the time of Prophet Ibrahim AS where the Kaaba cannot be damaged or destroyed by the hands of destroyers, except what has been determined by the Prophet SAW, as a form of law in changing the features of the mosque to be more mainstream and better, and it is wholly meant to replace the Ka'bah (istibdal).

c) Ijma'

The actions of Umar bin Khattab RA who had moved the mosque from one place to another in Kuffah and conveyed this policy to his guardian Sa'ad bin Abi waqqash, Umar went to his guardian after digging the baitul maal and ordered; "*Move the mosque immediately and place the baitul maal in the direction of the mosque, because this mosque will no longer be a place of prayer*". Then Abdullah bin Mas'ud stood up and did it. The process of moving this mosque has been witnessed by many friends and none of them disagree with it, so it can be said that Umar's ijthad has become the consensus of the friends, and even if it is said that it does not include ijma sharih, at least it is included in the ijma' sukuty where the scholars consider it permissible to do so. istibdal waqf Following this ijma.

d) Qiyas

The Qiyas from the practice of vows, as Jabir bin Abdillah RA narrated that there was a man who said to the Messenger of Allah on the day of Fathul Makkah: "*O Messenger of Allah, I have made a vow that if Allah gives victory over Mecca in your hands then I will pray two rak'ahs in Baitul Maqdis, the Messenger of Allah said; Pray here and then repeat again; Pray here!*". Rasulullah SAW ordered the person to pray in the Grand Mosque or at the Nabawiy Mosque because it has more and better rewards, as well as istibdal waqf which replaces waqf assets with better ones.

### **Istibdal Waqf In Mosque Construction Based On Fiqh Mu'amalah (Islamic Fiqh)**

Based on sharia law, it was found that the origin of waqf law is a form of manifestation in the intended use of waqf property. With this utilization, the benefits of waqf property will increasingly disappear, so it becomes a necessity to carry out istibdal to maintain the eternity, resilience, and sustainability of the benefits and still achieve the original purpose of the waqf property.

The scholars of the four schools of thought in conducting legal istinbath tend to have different opinions regarding istibdal waqf such as the Hanafiyah school. They require istibdal on three conditions; *First, wakif provides conditions for himself or for the person who takes over the substitute waqf. Second, waqf objects are no longer useful or fulfill their provisions. Three, the waqf object is durable, but it is possible to replace it with something more useful, and the wakif does not put any conditions.* As for the Malikiyah school, it is said that mosques are not allowed to be sold based on the consensus of the ulama, but some groups such as Sheikh al-Khursyi allow (Az Zuhaili, 1985). Al-'Ubaidiy in Istibdal al-Waqf Ru'yah Syar'iyah Iqtishadiyyah Qanuniyyah explains this permissibility in the form of relief on movable waqf objects if the object has been damaged or changed from its original purpose, and immovable objects are basically prohibited unless there are conditions that compel istibdal such as the expansion of mosques and highways (Al-'Ubaidiy, 2009).

Different from the Malikiyah school, the majority of the Shafi'iyah schools view istibdal waqf as absolutely prohibited. They said: It is not permissible to sell waqf objects even though they are damaged, and anyone who is not allowed to sell them while they are still useful, then it is not

permissible to sell them when they are damaged. While the Hanabilah school is considered the closest to the Hanafi school as a more flexible school. This school does not distinguish between movable and immovable objects. If there are problems in both, then it is permissible to sell the mosque if it has been damaged or is not following its original purpose (Al-'Ubaidiy, 2009).

Ibn Qudamah in al Mughni states that if the waqf property is damaged so that it cannot provide benefits (used) according to its purpose, it should be sold, Then the proceeds of the sale are bought for other goods that will bring benefits in accordance with the purpose of the waqf and the goods purchased are domiciled as waqf assets as before (Qudamah, 1969).

Istibdal in mosques with replacements such as or with better ones, according to Ibn Taimiyah, becomes permissible for two reasons, namely urgent need (al-Hajah) and maslahat (Taimiyah, 2004). Sayyid Sabiq in Fiqh as-Sunnah gives examples of each of the reasons that Ibn Taimiyah has mentioned in his Majmu' Fatawa. For example, in urgent conditions, such as a damaged mosque and it is no longer possible to use it as a place of worship, the land is sold and the proceeds from the sale are used to buy what can be used to replace it, then for the maslahah, For example, a mosque that is no longer suitable for local Muslims, may be sold and used to build a new mosque, so that Muslims can use and prosper it to the fullest (Sabiq, 2004).

From the explanation of the opinions of the fuqaha of these four schools, the author considers that the opinion that says it is permissible for waqf istibdal is the strongest opinion based on the evidence of each. The entire argument as presented by the school which rejects the practice of istibdal waqf can be seen as a form of ihtiyath (prudence) and sad-adzaraa'i rules. However, this school only provides relief or istibdal waqf permissible on movable objects but not on immovable objects.

From the rules of Fiqh Mu'amalah (Islamic Law) that have been put forward when associated with the issue of Istibdal Waqf in the management and construction of mosques, it seems that there are no prohibitions and it becomes permissibility with the requirements stated previously, regarding the existence of contradictions that occur from the opinions of the scholars and also the opinions of several schools of thought, this conflict does not make the impossibility of performing Istibdal Waqf null and void because there is no implicit argument forbidding it. Then this is not a comprehensive opinion (jumhur ulama').

### **Istibdal Waqf In A Positive Legal Perspective In Indonesia**

The change or exchange of waqf property has clearly been contained in Law Number 41 of 2004 in Article 36, where Nazhir through PPAIW re-registers with the authorized institution and The Indonesian Waqf Board for waqf assets that are exchanged or changed their designation is by the applicable provisions in the procedure for registering waqf assets. However, Article 41 states that there is an exception to Article 40 letter F, namely if the waqf property that has been waqf is used for the public interest following the general spatial plan (RUTR). Furthermore, Article 41 paragraph 2 states that the implementation of the provisions as referred to in paragraph 1 can only be carried out after obtaining written permission from the Minister with the approval of the Indonesian Waqf Board. Then in Article 3, waqf assets whose status has been changed due to the provisions of the exception as referred to in paragraph 1 must be exchanged for assets whose benefits and exchange value are at least the same as the original waqf assets.

Article 67 paragraph 1 states that if there is a transfer of rights to the waqf property that has been waqf as referred to in Article 40 or without permission to exchange the waqf property that

has been waqf as referred to in Article 41, shall be sentenced to a maximum imprisonment of 5 (five) years and/or a maximum fine of Rp. 500,000,000.00 (five hundred million rupiah) as well as in Article 67 paragraph 2, Any person who deliberately changes the designation of waqf property without a permit as referred to in Article 44, shall be sentenced to a maximum imprisonment of 4 (four) years and/or a maximum fine of Rp. 400,000,000.00 (four hundred million rupiahs).

In-laws and regulations, it is possible to change waqf objects (Istibdal), whether regulated by law. Number 41 of 2004 as well as other derivative regulations such as Government Regulations, Minister of Religion Regulations, Land Agency Regulations and Indonesian Waqf Agency Regulations. However, in the legislation it is not discussed about Istibdal Waqf in the management and construction of mosques, if you look closely, the existing rules only state that one of the waqf assets can be used for "houses of worship" activities as well as the exchange of waqf objects as the rules that follow, therefore, the replacement or exchange of the waqf property in question (Masjid) in terms of management and rebuilding is permissible but by following strict regulations following existing regulations.

### 3 Conclusion

Istibdal Waqf in the construction and management of mosques is permissible among some scholars such as Ibn Qudamah and Ibn Taimiyah as well as some scholars of other schools of thought, with the condition that there is an element of *maslahah*, *dharurah* and also benefit by returning the original purpose and purpose of waqf from the wakif by the waqf manager (Nazhir). As for the scholars who reject this because of differences in the views of *ihtiyath* (prudence) and the *sad-adzaraa'i* rules. Meanwhile, the laws and regulations concerning waqf, namely Law no. 41 of 2004 as well as other derivative rules, if observed, appear to have similarities with the view of *Fiqh Mu'amalah* (Islamic Law) which provides space for the replacement of waqf assets for optimizing the use of waqf assets for the benefit of the community. However, this activity must be following applicable legal regulations. With the enactment of Law Number 41 of 2004, the replacement of waqf property has strong legal force, even if there is a replacement and exchange of waqf property that does not get permission from the government and is against the law will be subject to penalties ranging from 3-5 years and fines.

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